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No. 85-5542 (13)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually
and as next friend on behalf of
ALVIN BERNARD FORD,
Petitioner,

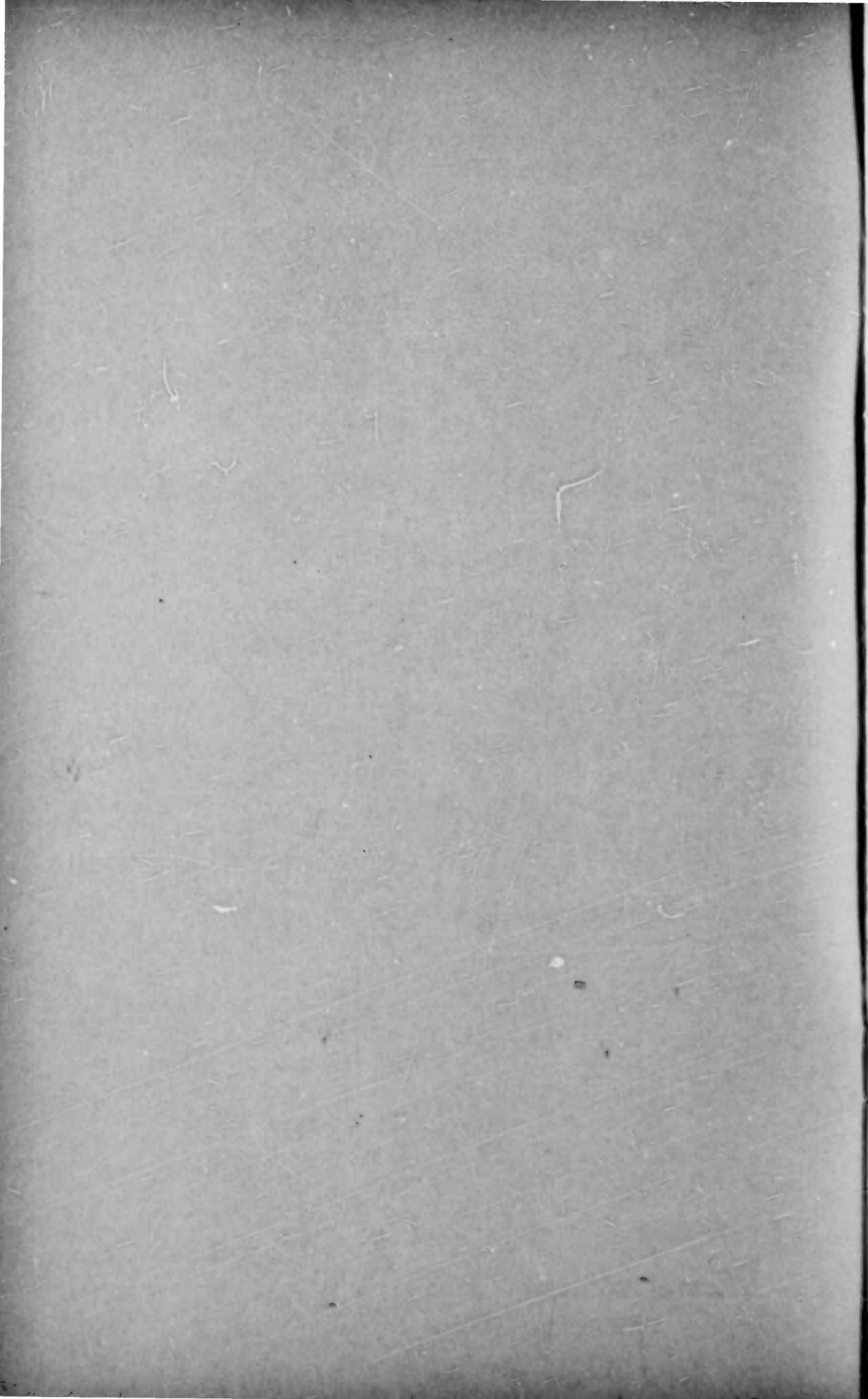
v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE FOR
THE AMERICAN PSYCHIATRIC ASSOCIATION**

JOEL I. KLEIN
(Counsel of Record)
ROBERT D. LUSKIN
JEAN M. SCOTT
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amicus Curiae



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FOR THE AMERICAN PSYCHIATRIC ASSOCIATION**

The American Psychiatric Association (APA) hereby moves, pursuant to S. Ct. Rules 36 and 42, to file the attached brief amicus curiae in support of the petitioner. Counsel for petitioner has consented to the filing but counsel for respondent has not.

The APA, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Approximately 32,000 of the nation's 40,000

psychiatrists are members. The APA has participated as amicus curiae in numerous cases involving psychiatric issues, including *Allen v. Illinois* (No. 85-5404), *Smith v. Sielaff* (No. 85-5487), *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Mills v. Rogers*, 457 U.S. 291 (1982), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

In recent years the APA has become increasingly involved in examining the role of psychiatric testimony on a variety of legal issues, especially as these issues have arisen with greater frequency in capital punishment cases. The Association believes it is critical that psychiatric contributions be limited to areas of established expertise, *see, e.g., Barefoot v. Estelle, supra*, and that they be subject to procedural safeguards that assure a reasonable measure of professional reliability. *See, e.g., Ake v. Oklahoma, supra; Smith v. Sielaff, supra.*

The instant case involves yet another area of psychiatric inquiry in capital punishment cases—i.e., a death row prisoner's competence to be executed. Whenever such an inquiry is to be made, it is evident that psychiatrists will be called on to provide the principal, if not only, opinions that will form the basis for the ultimate decision. It is thus of considerable concern to the APA and its members that the process by which such decisions are made be fair and reliable so as to protect the integrity of the determination and the role to be played by psychiatric opinions in reaching that determination. The APA further believes that it is especially well-situated to explain the nature of the psychiatric evaluation at issue here, as well as the kinds of procedures that are most likely to help a decisionmaker understand the evaluation process and reach a fair and accurate judgment regarding a prisoner's competence.

For these reasons, the APA requests that its motion to file the attached amicus curiae brief be granted.

Respectfully submitted,

JOEL I. KLEIN

(Counsel of Record)

ROBERT D. LUSKIN

JEAN M. SCOTT

ONEK, KLEIN & FARR

2550 M Street, N.W.

Washington, D.C. 20037

(202) 775-0184

Counsel for Amicus Curiae

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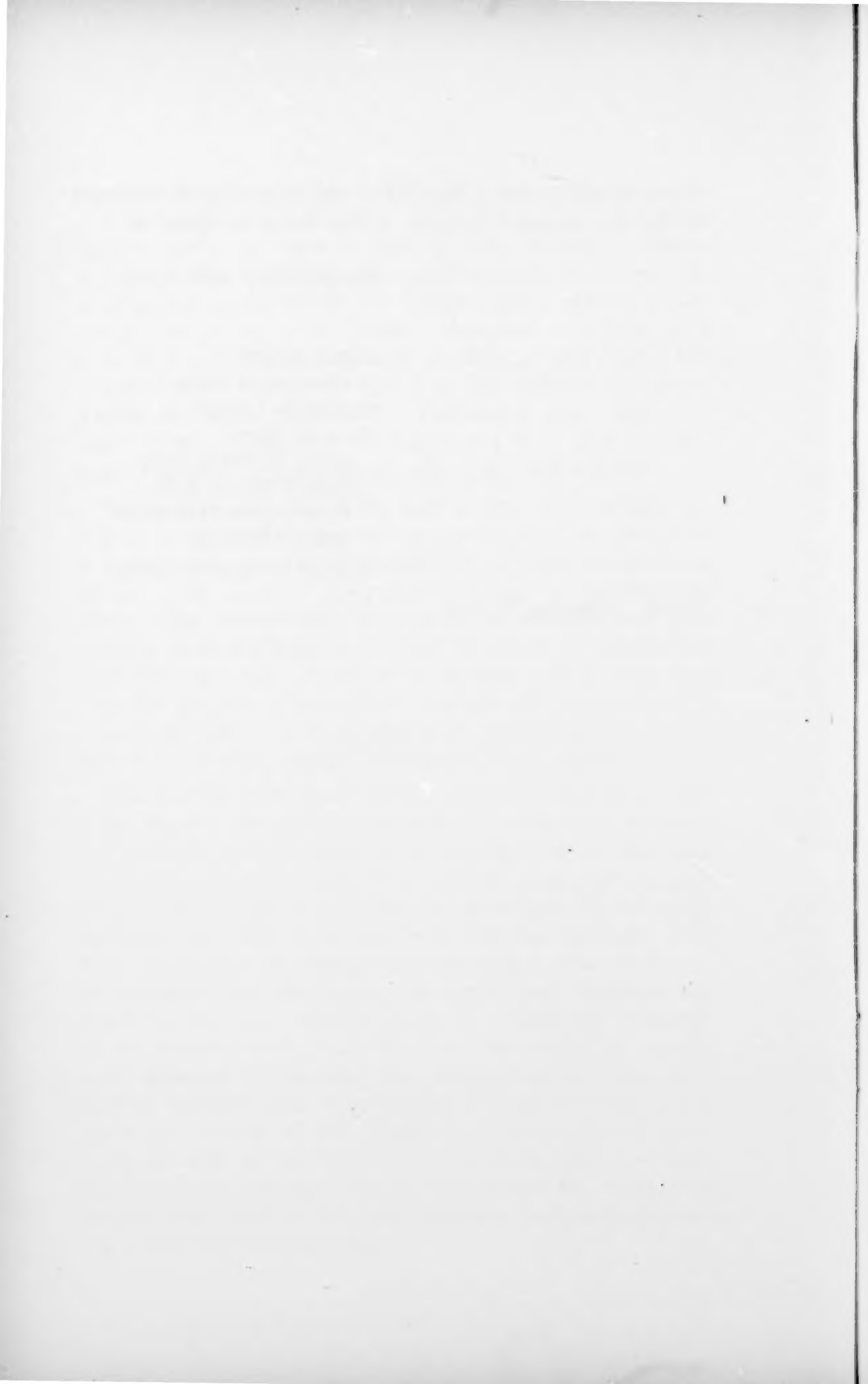


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**BRIEF AMICUS CURIAE FOR THE
AMERICAN PSYCHIATRIC ASSOCIATION**

INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears from the foregoing motion.

STATEMENT

Petitioner Alvin Ford was convicted of first degree murder for the July 21, 1974 shooting of a police officer, and was sentenced to death. During the time that he pursued a variety of appeals and post-conviction remedies, Ford remained confined on Florida's death row. While

his mental state was never an issue in any of the proceedings resulting in his conviction and sentence, he began to manifest bizarre symptoms in late 1981. At first, he claimed that he was aware of the activities of the Ku Klux Klan outside the prison and that he could communicate this knowledge telepathically to the news media. He also believed that, in retaliation, the Klan had seized members of his family and was torturing them in an area near his cell.

Throughout 1982 and 1983 Mr. Ford's condition appeared to deteriorate: he claimed to have joined the Ku Klux Klan, freed the hostages held by the Klan, and appointed new justices to the Florida Supreme Court. By October of 1983, Ford believed that he was free to leave death row because the justices whom he had appointed to the Court, in a case he termed "*Ford v. State*," had overturned the statute under which he was sentenced. As Mr. Ford's delusions became more pervasive, his ability to communicate also apparently deteriorated and he often spoke incoherently.

Under Florida law, if a prisoner is not competent at the time of his execution—i.e., if he is unable to understand either "the nature and effect of the death penalty," or "why it is to be imposed upon him"—the imposition of his death sentence must be delayed until his competence is restored. Fla. Stat. § 922.07 (1983). In view of this provision, and concerned about his client's mental condition, Ford's counsel requested two psychiatrists to evaluate him. These psychiatrists each examined Ford on several different occasions and also reviewed the available medical records and other pertinent information.¹ Both doctors diagnosed Ford as suffering from

¹ Dr. Amin conducted four separate interviews with Ford between July 1981 and August 1982. He also reviewed his prison psychiatric and medical records and his correspondence, and talked with Ford's relatives, attorneys, other inmates and prison personnel. Joint Appendix (J.A.) 87. After August of 1982 Ford refused to

paranoid schizophrenia.² Dr. Kaufman further concluded that, as a result of his illness, Ford was incompetent under the Florida standards. J.A. 108.

Ford's counsel also initiated the review procedures provided for in the Florida statute governing competence to be executed. Pursuant to that statute, Governor Graham—who ultimately is responsible for making the decision on competence—appointed a commission of three psychiatrists to examine Ford.³ Doctors Ivory, Mhatre, and Afield jointly examined him on December 19, 1983, for a total of approximately thirty minutes in a courtroom at the Florida State Prison with about eight people present, including lawyers for Ford and the Governor, and correctional officials. In addition, the psychiatrists visited Mr. Ford's cell, discussed his condition with the correctional and medical staff, and reviewed his prison medical

see Dr. Amin, claiming that he was part of the conspiracy, along with the Ku Klux Klan, to persecute him. Dr. Kaufman was then retained by Ford's counsel. He examined Ford at length on November 3, 1983, and May 23, 1984, and also relied on information provided by Dr. Amin.

² On the basis of his first interview, Dr. Kaufman diagnosed Ford as schizophrenic, undifferentiated type. J.A. 96. After a second interview, Kaufman concluded that Ford was a paranoid schizophrenic. *Id.* at 108.

³ Section 922.07(1) of the statute provides:

When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

records. Defense counsel also provided to each examiner a psychiatric profile of Mr. Ford prepared at the time of his trial in 1974, samples of his correspondence during 1982-1983, and reports of the evaluations conducted by the two psychiatrists whom counsel had independently retained.

Each of the three psychiatrists appointed by the Governor submitted a written report to him. While Dr. Ivory concluded that Ford was malingering, Doctors Mhatre and Afield found that he was suffering from a psychosis. All three psychiatrists nevertheless agreed that Ford was competent for purposes of execution.⁴ In response to these reports, Ford's counsel filed a written submission with the Governor, which included the reports of the two other psychiatrists who had examined Ford. The Governor's office refused to inform counsel whether his submission would be considered. *See* Tr. May 29, 1984 Hearing at 15-16. The Governor's public position was to "exclud[e] all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode v. Wainwright*, 448 So.2d 999, 1001 (Fla. 1984).

On April 30, 1984, Governor Graham, concluding that Ford was competent, issued a death warrant. Ford's mother, as next friend, then filed a motion in state court requesting a stay of execution along with a hearing and the appointment of experts to determine Ford's competence for execution. The request was denied and an appeal was taken to the Florida Supreme Court, which also denied relief. *Ford v. Wainwright*, 451 So.2d 471 (Fla. 1984). Thereafter, a petition for habeas corpus was filed in the United States District Court for the Southern District of Florida, asserting a constitutional

⁴ Dr. Mhatre indicated, however, that Ford "is in need of appropriate antipsychotic medication, [and that] without such treatment he is likely to deteriorate further and may soon reach a point where he may not be competent for execution." J.A. 103-104.

right to be competent at the time of execution and an accompanying entitlement to an evidentiary hearing on the issue of competence. The petition was denied without a hearing.

On appeal, the Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and stayed Mr. Ford's execution. *Ford v. Strickland*, 734 F.2d 538 (11th Cir.), *aff'd*, 104 S.Ct. 3498 (1984). A divided panel of that court, however, ultimately affirmed the district court's denial of the habeas petition. Rejecting Ford's claim "that the prohibition against execution because of insanity is rooted in the eighth amendment," the court noted that "[n]o federal appellate court has so held." *Ford v. Wainwright*, 752 F.2d 526, 527 (11th Cir. 1985). The Eleventh Circuit also turned down Ford's procedural due process challenge to the Florida statute on the ground that *Solesbee v. Balkcom*, 339 U.S. 9 (1950), which had rejected the same argument concerning a virtually identical Georgia statute, was controlling in this case. Judge Clark dissented. He believed that developments in Eighth Amendment doctrine since *Solesbee* precluded execution of the insane, and that the "Florida procedure [is] totally lacking in due process protection. There is no room for advocacy, no written findings, and no judicial review." *Ford v. Wainwright*, *supra*, 752 F.2d at 533 (footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question of whether there is a right not to be executed unless competent raises difficult legal and moral problems.⁶ The solution to these problems, however, is

⁶ The source of any constitutional protection in this regard would either be the Eighth Amendment's prohibition on cruel and unusual punishment or the Fourteenth Amendment's more general recognition of certain liberty interests. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972). Depending on the source, the protection might be characterized as a "prohibition" on the state or as a "right" of the individual. For convenience, we use the term "right" throughout this brief.

not to recognize the right in principle and then to denigrate its significance by subjecting it to the most cursory form of procedural review. In Florida, three psychiatrists briefly and collectively examine the prisoner and prepare conclusory written reports for the Governor who, on this basis, decides the prisoner's competence. Whatever else might be said, we are confident that such an approach undermines the fairness and validity of the determination by effectively relegating this important and highly visible legal question to pre-selected psychiatrists whose evaluations are conducted in a hurried fashion and whose views may be neither challenged nor explored.

In view of these concerns, the APA will here address the procedures necessary for an adequate psychiatric examination and ultimate determination of competence to be executed. We take no position on the underlying questions of whether there should be a right not to be executed while incompetent and, if so, what the standard of competence should be for this purpose: resolution of those matters turns on considerations as to which the Association possesses no special expertise.⁶ If there is to be such a determination, however, we think the Flor-

⁶ We recognize, of course, that the existence of such a right inevitably will lead to certain problems directly affecting psychiatrists. If a prisoner cannot be executed unless competent, the responsibility for treating mentally incompetent prisoners will fall on psychiatrists, who may then have to resolve difficult ethical issues concerning the provision of treatment that may result in the imposition of a death penalty. Cf. APA, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, Section 1, Annotation 7 (1985) (prohibiting psychiatrists from participating in legally authorized executions). Moreover, there will also be troubling legal issues about a prisoner's right to refuse treatment in these circumstances (presumably under some theory of "best interests" or "substituted judgment").

We should note in this regard that, irrespective of whether the right has a constitutional basis, these issues will arise in states like Florida and the many others that currently do not allow prisoners found incompetent to be executed.

ida procedures for deciding a matter of this importance are deficient in three critical respects.

1. The psychiatric evaluation process itself is flawed in design. By tolerating quick, group evaluations by the state-appointed psychiatrists, the Florida procedures do not allow for the kind of careful and comprehensive examination that is necessary to reach reliable professional opinions on the issue of competence. Although this Court has previously declined to impose substantive limitations on the methods used for arriving at expert psychiatric opinions, *see Barefoot v. Estelle*, 463 U.S. 880, (1983), the legal inquiry into competence at issue here is sufficiently different to warrant the opposite conclusion. In the present context, inadequate evaluations seriously compromise the reliability of the process from its inception and, therefore, violate due process.

2. The failure to allow consideration of the reports and opinions of psychiatric experts retained by the prisoner violates basic principles of fairness. Indeed, "the fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). By eliminating this protection, Florida denies the decisionmaker potentially important probative information on a matter that is often subject to reasonable professional disagreement.

3. The absence of cross-examination also amounts to a denial of due process in the circumstances presented here. The determination of a prisoner's competence depends not only on a medical diagnosis, but also on the ability to relate that diagnosis to the governing legal standard. A psychiatrist who renders an opinion on a matter as controversial as a prisoner's competence to be executed should be subject to cross-examination to determine how he reached his opinion, what information might have led him to a different conclusion, and the level of confidence with which he holds that opinion. *See, e.g., Barefoot v. Estelle, supra; Ake v. Oklahoma*, 105 S.Ct. 1087 (1985).

ARGUMENT

I. THE FLORIDA PROCEDURES FOR DETERMINING COMPETENCE TO BE EXECUTED ARE CONSTITUTIONALLY FLAWED BECAUSE THEY DO NOT PROVIDE FOR PROFESSIONALLY ADEQUATE PSYCHIATRIC EVALUATIONS AND PROPER PROCEDURES FOR ASSURING RELIABLE DECISIONS.

The touchstone of any due process inquiry is the need to assure reliability. This Court has been particularly demanding when assessing procedures that culminate in execution. It has consistently required that states develop procedures that minimize the risk of error. *See Zant v. Stephens*, 462 U.S. 862, 884-85 (1983); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion). "From the point of view of the defendant, [capital punishment] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion).

To be sure, the issue here is somewhat different since the propriety of a death sentence is no longer in question. Rather, the issue is whether the state may impose a sentence that has, by definition, finally been determined to be valid. That question—assuming there is a right not to be executed unless competent—nevertheless depends on a factual finding, the significance of which is obvious: it may delay indefinitely the imposition of the death penalty. Such an effect, we believe, is plainly of sufficient consequence to warrant procedures that will ensure reliable factual determinations on the issue of competence.

Although this Court has made clear that specific procedural requirements may vary depending on the competing interests affected by a given determination, *see, e.g.*,

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), it is inconceivable that a determination having consequences as serious as those at stake here could be made with sufficient reliability through the cursory review process employed in Florida. Indeed, even when matters of considerable less gravity are at stake, the Due Process Clause uniformly has been held to require at least an administrative process governed by the basic procedures that characterize the adversary process. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (welfare benefits); *Morrissey v. Brewer*, *supra*, 408 U.S. at 487-89 (parole revocation); *Vitek v. Jones*, 445 U.S. 480, 494-97 (1980) (transfer from prison to mental hospital).⁷

Measured against these established standards, we think the Florida procedures for determining competence to be executed are constitutionally deficient in three specific respects: (1) they fail to provide for adequate evaluations by the state-appointed psychiatrists; (2) they prohibit consideration of probative evidence based on the opinions of experts retained by the prisoner; and (3) they fail to allow for cross-examination of all psychiatrists who proffer an opinion on the issue of competence to be executed.⁸

A. The Psychiatric Evaluation Process Used To Assess Competence To Be Executed Is Inadequate To Assure Professionally Reliable Opinions.

The statutory procedure in Florida provides that the Governor shall "appoint a commission of three psychiatrists to examine the convicted person." Fla. Stat. § 922.07(1)

⁷ In the latter two cases, the Court held that certain procedural rights could be denied in a particular case for good cause. *Morrissey v. Brewer*, *supra*, 408 U.S. at 489; *Vitek v. Jones*, *supra*, 445 at 494-95.

⁸ We also wish to note our preference for a judicial determination of the issue because of the especially controversial nature of the death penalty and its ultimate imposition. In any event, we question whether a politically elected official like the Governor is the proper person to make this decision.

(1983). These psychiatrists are required to conduct their interview at "the same time," and "[c]ounsel for the convicted person and the state attorney may be present at the examination." *Ibid.* In the instant case, the state-appointed psychiatrists interviewed the prisoner once for approximately thirty minutes, reviewed his prison medical records, checked his cell and spoke to prison personnel. During the interview itself, in addition to counsel for the parties, correctional officials were present. These procedures, both on their face and as applied, are insufficient to assure reliable psychiatric opinions on the issue of competence.

To begin with, the hurried nature of the process means that traditional evaluative techniques which are often essential to an adequate examination simply are not used. In many instances, for example, it is necessary to conduct more than one clinical interview. See S. Halleck, *Law in the Practice of Psychiatry: A Handbook for Clinicians* 201 (1980) ("[m]ost patients . . . should be interviewed for several hours"). Thus, researchers who have studied death row inmates have uniformly relied on repeated interviews to reach valid psychiatric diagnoses. See e.g., Bluestone & McGahee, *Reaction To Extreme Stress: Impending Death By Execution*, 119 *Amer. J. Psychiat.* 393 (1962); Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 *Amer. J. Psychiat.* 81 (1972). Similarly, a comprehensive examination may also require "a physical examination, neurologic examination, neuropsychological testing, EEG, CT scan, or skull films." APA, *The Role of Psychiatry in the Sentencing Process* 18 (1984). But the time needed to perform these procedures is not available when the press to carry out a scheduled execution takes priority.

The use of a group interview, moreover, with the presence of correctional officials and state attorneys, let alone the prisoner's attorneys, may often undermine the opportunity for an effective interview. See *Estelle v. Smith*, 451

U.S. 454, 470 n.14 (1981), quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979) ("an attorney present during the psychiatric interview . . . might seriously disrupt the examination"). As Dr. Seymour Halleck explained in an affidavit provided to Ford's counsel, "[i]n the setting described it would have been extremely difficult for Mr. Ford to fully reveal his problems or the nature of his illness. The thirty minute effort to establish communications under the conditions already noted was also inadequate." J.A. 112.

The effects of this inadequate examination process can readily be seen in the present case. The question of malingering, raised by two of the state-appointed psychiatrists,⁹ is obviously a real concern in this context. For precisely this reason, it may also be highly prejudicial even if suggested by only one examiner. Thus, when the question arises, there should be a special effort to evaluate it carefully. There are various established approaches, including psychological and organic testing, that can strongly, if not conclusively, support a reliable answer. See Resnick, *Detection of Malingered Mental Illness*, 2 Behavioral Science and the Law 21 (1984). Those approaches were not used here, however.

The inadequacy of the evaluation process can also be seen by comparing the diagnoses reached by the various psychiatrists. Two of the state-appointed psychiatrists concluded that Ford was suffering from a psychosis,¹⁰

⁹ Dr. Ivory's report stated that Ford "knows exactly what is going on," and that "[t]his inmate's disorder, although severe, seems contrived and recently learned." J.A. 98, 100. Dr. Afield stated that Ford's "disorganization is somewhat 'put on.'" *Id.* at 105. He nevertheless concluded that "the profoundness of [Ford's disorganization] forces me to put a 'psychotic' label on the inmate." *Ibid.*

¹⁰ According to Dr. Mhatre, Ford was suffering from "psychosis with paranoia." J.A. 103. Since that is not a recognized diagnosis, it is not clear whether Dr. Mhatre considered Ford to be suffering from paranoid schizophrenia or, more generally, psychosis. After

which is a non-specific classification that includes various types of schizophrenias, affective disorders and organic brain disorders. See APA, *Diagnostic and Statistical Manual of Mental Disorders* 368 (3d ed. 1983).¹¹ To make such a diagnosis, a psychiatrist must determine that "there are psychotic symptoms (delusions, hallucinations, incoherence, loosening of association, markedly illogical thinking, or behavior that is grossly disorganized or catatonic) that do not meet the criteria for any [more] specific mental disorder." *Id.* at 202-03. The non-specific diagnosis of psychosis thus reflects one of two possibilities: either the psychiatric examination permitted consideration and rejection of other more specific mental disorders or, more likely, the psychiatrist possessed insufficient information to make a more specific diagnosis.

The diagnosis of paranoid schizophrenia made by the psychiatrists retained by Ford's counsel, while consistent with the general diagnosis of psychosis, requires that a person also be found to have at least a six-month history of either persecutory delusions, grandiose delusions, delusional jealousy, or hallucinations with persecutory or grandiose content. *Id.* at 191. The ability of these psychiatrists to make this more discriminating diagnosis tends to suggest that they were able to elicit substantially more information in their extended evaluations of Mr. Ford than was elicited by the state-appointed psychiatrists. It also suggests that the examinations by the state-appointed psychiatrists were simply insufficient to fully evaluate him.

When an expert evaluation process leads to such unsatisfying results in an area where so much is at stake, we

his initial description, Dr. Mhatre later says only that "Ford is suffering from psychosis." *Ibid.*

¹¹ The *Diagnostic and Statistical Manual of Mental Disorders*, which is currently in its third edition and is often referred to as DSM-III, is the basic psychiatric diagnostic manual of the medical profession.

think it is appropriate to insist that the process itself be invalidated. This case is significantly different from *Barefoot v. Estelle*, *supra*, 463 U.S. at 901-04, where the Court rejected a claim that the use of hypothetical questions as a basis for forming a psychiatric opinion in capital cases violated due process. The issue here is a prisoner's mental state which, in contrast to the question of future dangerousness presented in *Barefoot*, can only be based on a mental examination.¹² If those mental examinations do not meet basic professional standards relating to the conditions under which the examination is performed and the time available for thorough evaluation and the use of adjunctive procedures, it is difficult to see how a legal determination that turns largely, if not exclusively, on such examinations can claim to be reliable in any meaningful way.

B. The Failure To Allow For Consideration Of Opinions By Psychiatrists Retained By The Prisoner Denies Fundamental Fairness.

It is well-established that "the fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, *supra*, 234 U.S. at 394. See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Despite this recognition, the Florida procedures restrict expert opinions to those psychiatrists appointed by the Governor. In our view, this restriction needlessly eliminates potentially important evidence. When the consequences attaching to the decision in question are as important as they are here, due process requires that all relevant opinions at least be considered.

This conclusion is fully consonant with basic principles repeatedly recognized by this Court. Thus, the Court has

¹² In contrast to an assessment of competence, a prediction of future dangerousness depends much more on a person's past behavior and much less on a consideration of his current mental condition. See J. Monahan, *The Clinicial Prediction of Violent Behavior* (1981).

emphasized that in imposing a sentence of death, it is "essential" that the factfinder "have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion). Accord *Barefoot v. Estelle*, *supra*, 463 U.S. at 897-99; *Zant v. Stephens*, *supra*, 462 U.S. 886-87; *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

In addition, only last Term the Court held that when a defendant's mental condition is a "significant factor" in the legal issue to be resolved, he is entitled to psychiatric assistance to help present his case. *Ake v. Oklahoma*, *supra*, 105 S. Ct. at 1097. As the Court explained, when this condition is satisfied, "the factfinder would have before it both the views of the prosecutor's psychiatrist and the opposing views of the defendant's doctors and would therefore be competent to 'uncover, recognize, and take due account of . . . shortcomings.'" *Ibid.*, quoting *Barefoot v. Estelle*, *supra*, 463 U.S. at 899. In view of this recognition, *Ake* went so far as to require that the state pay for the necessary psychiatric assistance for a defendant. It is implausible to suggest, therefore, that a state could have an interest sufficient to justify a blanket exclusion of psychiatric opinions based on evaluations commissioned by the prisoner which cost the state nothing.¹³

Once again, the potential prejudice from excluding these opinions is evident. Ford was examined by five psychiatrists. Of these, only the two retained by Ford's counsel met with him more than once or conducted lengthy and private interviews. These two psychiatrists indicated that Ford was suffering from the specific dis-

¹³ Even in circumstances such as competency to stand trial, where the court may appoint a psychiatric expert to conduct an evaluation, *see, e.g.* Fla. Stat. § 916.11 (1983), we are aware of no procedure that would prevent the subject of such an examination from submitting the results of evaluations conducted on his behalf.

order of paranoid schizophrenia, J.A. 91, 108, and the one of the two who expressed an opinion on Ford's competence concluded that he was incompetent under the Florida standards. *Id.* at 108.¹⁴ Two state-appointed psychiatrists, who reviewed the findings of the psychiatrists retained on Mr. Ford's behalf, also concluded that he was suffering from a severe mental disorder, but found him competent. *Id.* at 103, 105-06. The third, who relied solely on the group interview and information obtained at the prison, believed Ford was malingering. *Id.* at 98-100.

In view of the range of psychiatric opinion, the decision to exclude the evidence collected on behalf of Mr. Ford was plainly indefensible. It denied to the Governor the opinions, based upon the most extensive clinical foundation, corroborating the finding of two of the three state-appointed psychiatrists that Mr. Ford suffered from a severe mental disorder. Moreover, it excluded the opinion, and the data and analysis supporting that opinion, of the one psychiatrist who concluded that Ford was incompetent. While the result of the Florida procedure was the submission to the Governor of a unanimous finding of competence, that unanimity was bought here at too high a price. Even if all the reports had been considered, of course, the decision may have been the same. But it is one thing to reach a conclusion after at least weighing all relevant evidence. It is an entirely different matter to ignore probative information altogether.

C. The Failure To Allow For Cross-Examination Of Experts Who Render Opinions Concerning Competence To Be Executed Violates Due Process.

While not as fundamentally important as the rights to a professionally adequate examination by state-appointed psychiatrists and to present one's own psychia-

¹⁴ The other psychiatrist, Dr. Amin, was not asked to render an opinion on Ford's competence.

tric evaluations, the opportunity to cross-examine psychiatric witnesses is nevertheless sufficiently important to warrant its constitutional necessity in the present circumstances. Cross-examination is generally recognized as a basic safeguard for assuring reliable factual determinations. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 63-64, 72 (1980); *Goldberg v. Kelly*, *supra*, 397 U.S. at 269-70; *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969). There is nothing so different about a process that relies on expert opinion to establish competence for execution that would warrant disposing of this protection here.

Two factors, in particular, lead us to this conclusion. First, the legal issue in question requires not only an assessment of the prisoner's mental condition but also a determination of "whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." Fla. Stat. § 922.07(1) (1983). Thus, whether or not a psychiatrist is willing to render an opinion in the precise terms of the legal standard,¹⁵ he nevertheless must perform the additional analytic step of relating a medical diagnosis to the prisoner's ability to understand the matters in question. In the absence of cross-examination, it is difficult for the factfinder to determine what it is about a person's mental condition

¹⁵ There is considerable professional dispute about the propriety of testifying in terms of ultimate legal issues. The APA has previously taken the position that such testimony should be avoided since it tends to usurp the role of the factfinder by confusing psychiatric with moral or legal questions. See APA, *Statement on the Insanity Defense* 13-14 (1982). In the instant case, for example, the critical term in the standard for competence used in Florida is the word "understands," a word that is not defined in the statute. The ultimate decision, therefore, depends on a judgment of just what level of understanding or lack thereof is sufficient to find someone incompetent. That is a legal, not a psychiatric, determination. Psychiatric testimony can certainly illuminate the effect of a person's mental disorder on his ability to understand certain matters. But no psychiatric expertise is involved in determining whether a person's understanding is *sufficiently* impaired to render him legally incompetent.

that affects his ability to understand, how and to what extent that ability is impaired, and whether the impairment is temporary, transitory or permanent.

In addition, there is a special reason for requiring cross-examination here. Because the death penalty arouses strong personal feelings, there is an increased risk that without cross-examination the resolution of competence may be colored by personal opinions regarding capital punishment. The effect may be felt subtly, through the refusal of many well-qualified psychiatrists to participate in a procedure whose reliability and fairness they question. Or it may be more overt, with personal bias influencing an expert opinion, especially when it includes the adaptation of a medical diagnosis to a legal standard. See note 15 *supra*. See also *Barefoot v. Estelle, supra*, 463 U.S. at 899-901. Whatever its complexion, such influence further undercuts the reliability of a process that lacks adequate safeguards.

While it is always difficult to speculate on the effect of not allowing cross-examination, it would appear that its absence in this case was potentially significant. The inadequacy of the examination process used by the state-appointed psychiatrists was certainly a matter that could have been explored and then contrasted with the much more extensive evaluation done by the psychiatrists retained by defense counsel. In addition, several of the critical conclusions in the written reports of the state-appointed psychiatrists merited extended consideration. Dr. Mhatre, for example, stated that, while "Ford is suffering from psychosis at the present time, he has *enough* cognitive functioning to understand the nature and effects of the death penalty, and why it is to be imposed upon him." J.A. 103 (emphasis supplied). What exactly the doctor meant by "enough" is the kind of question that requires careful exploration as to where psychiatric expertise leaves off and legal or moral judgments begin. And Dr. Ivory, while forming the opinions

that Ford knew "exactly what [was] going on and . . . that he [was] in touch with reality," *id.* at 98, nevertheless recommended "that a medical review to look into the feasibility of psychotropic medication might be helpful." *Id.* at 100-01. These views are at least facially inconsistent and would have benefitted from further questioning.

In sum, in the circumstances presented, the absence of cross-examination sufficiently undercuts the overall reliability of the process to violate due process.¹⁶

¹⁶ Notwithstanding our conclusions regarding these various due process protections, we believe that there is one situation where the state's interest in carrying out a death sentence in a timely fashion justifies a different approach. The inquiry called for in a competence to be executed determination differs in a critical respect from other legal inquiries into mental state: Because the standard is based upon the convicted person's competence at the time the sentence is to be carried out, it requires the factfinder to make an essentially prospective determination of competence. This consideration raises at least the possibility of repeated claims of incompetence based upon assertions that the convicted person's mental condition has deteriorated following an initial determination of competence. While the state thus has an interest in addressing repeated claims in a rapid fashion, its ability to do so adequately is directly related to the quality of the initial factfinding. A proceeding conducted in accordance with reasonable due process protections is far more likely to permit the factfinder to make an accurate determination of the likelihood that a person might deteriorate materially in the immediate future, as well as of his current mental state. The information generated in such a proceeding, moreover, should often provide a sufficient clinical background to allow subsequent assessments of competence to be addressed reliably through less formal procedures.

CONCLUSION

For the foregoing reasons, the Court should rule that, if there is a right not to be executed while incompetent, the constitutional guarantee of due process requires adequate psychiatric evaluations and the opportunity for a prisoner to be heard and to cross-examine adverse witnesses.

Respectfully submitted,

JOEL I. KLEIN

(Counsel of Record)

ROBERT D. LUSKIN

JEAN M. SCOTT

ONEK, KLEIN & FARR

2550 M Street, N.W.

Washington, D.C. 20037

(202) 775-0184

Counsel for Amicus Curiae